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Ontario Labour Relations Board HIGHLIGHTS

Editors: Voy Stelmaszynski, Solicitor
Leonard Marvy, Solicitor

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SCOPE NOTES

The following are scope notes of some of the decisions issued by the Ontario Labour Relations Board in December of this year. These decisions will appear in the November/December issue of the OLRB Reports. The full text of recent OLRB decisions is now available on-line through the Canadian Legal Information Institute www.canlii.org.

Interim Order – Unfair Labour Practice – The Board reiterated its approach to determining if impugned employer conduct appeared to be unrelated to the exercise of employee rights under the Act: the test requires more than an arguable case; a mere whiff of probity will not satisfy the smell test – One employee was terminated for arriving late and leaving early on seven occasions during the first two months of his probationary period; there was no evidence that he was a vocal supporter of the union – The second employee (the applicant was not seeking her reinstatement) had a significant disciplinary record, and the culminating incident justified her discharge – An employer's compassion or forbearance during the employment relationship should not be held against it when assessing the criteria for resolving the request for an interim order – Application for interim relief dismissed; unfair labour practice complaint to proceed in the normal course

ATCO STRUCTURES AND LOGISTICS LTD.; RE: Labourers' International Union of North America, Local 183; OLRB File No: 2780-14-IO; Dated: December 23, 2014; Panel: Michael McFadden (10 pages)

Damages – Discharge – Employment Standards – Reprisal – An employee, S, brought an application to review a decision of an Employment Standards Officer ("ESO") – The ESO found S was not entitled to termination pay because she worked in the Construction Industry – S was an inside salesperson – The Board found S was not a construction employee and was therefore not disentitled to notice of termination or termination pay – MeadowBrook maintained S was not entitled to termination pay, claiming it had not terminated her employment – After a critical performance review and several written warnings regarding performance, a meeting between MeadowBrook and S occurred, following which S understood her employment to be terminated – Two days later MeadowBrook sent a letter to S outlining a "mutual agreement" it claimed the parties had reached during their last meeting, including a settlement offer and a release – S did not agree to sign the release – Rather, S sought her termination entitlement under the ESA – MeadowBrook took the position that, since S had not accepted its proposed terms, S was still an employee and expected to return to work – S gave notice to MeadowBrook of her claims under the ESA – When S did not return to work, MeadowBrook deemed S to have abandoned her job – The Board found S was terminated without notice and wrongfully denied termination pay as required by the ESA – Further, when S requested termination entitlements in accordance with the ESA, MeadowBrook engaged in reprisals against S – MeadowBrook issued three different and incorrect Records of Employment, delaying the ability of S to collect Employment Insurance – Further, MeadowBrook unsuccessfully contested the decision to grant S Employment Insurance

benefits – S was awarded termination pay in accordance with the ESA as well as damages for emotional pain and suffering caused by the acts of reprisal following the termination of her employment.

MEADOWBROOK CONSTRUCTION INC.; RE: Marlene Sanderse; RE: Director of Employment Standards; OLRB File No. 0365-14-ES; Dated December 15, 2014; Panel: Derek L. Rogers (22 pages)

Certification Where Act Contravened – Damages – Remedies – The Labourers brought an application to displace CLAC as the bargaining agent for a group of Percon employees, and sought remedial certification – Percon admitted it had violated the Act when it laid-off seven workers, transferred a union supporter, intimidated and coerced other employees, and instituted a hiring freeze during the Labourers' organizing campaign – The vote count resulted in an equal number of ballots cast for each union – The only issue to be determined before the Board was the appropriate remedy – The chilling effect of Percon's actions could not be undone – A second vote would not be suitable, as most of the relevant employees were no longer working at Percon – The Labourers admitted CLAC was an innocent party, even though it benefited from the violations of Percon – The Board declined to exercise its discretion to certify the Labourers – Rather, the appropriate remedy in such a case is one which does not invalidate the superior position of CLAC in terms of acquired rights – Had there been any evidence that might suggest participation by CLAC, CLAC would have an obligation to explain its role in the proceedings – The Board confirmed its interim reinstatement of the laid-off employees on a permanent basis and ordered Percon to pay lost wages, to reimburse the Labourers for costs incurred during the organizing drive, including legal expenses incurred in bringing the certification application, up until the date of the representation vote – Legal expenses associated with the interim application were not awarded, as the interim application was an inevitable piece of the litigation and was not affected by Percon's violations – The Board assessed the likelihood that the Labourers would have won the representation vote, but for Percon's violations, at sixty percent and ordered Percon to pay to the Labourers a sum equal to sixty per cent of the amount of union dues the Labourers would have received under the Labourers' Provincial Collective Agreement – Further, the Board directed Percon to advise the Labourers of the expiry date of its current agreement with CLAC and to provide the Labourers with the opportunity to address its employees on a date no later than three months before the expiry of the current agreement with CLAC – Orders accordingly

PERCON CONSTRUCTION INC.; RE: Labourers International Union of North America, Ontario Provincial District Council; RE: Construction Workers Local 52 affiliated with the Christian Labour Association of Canada; OLRB File No. 2963-09-U & 3258-09-R; Dated December 29, 2014; Panel: David A. McKee (29 pages)

Public Sector Labour Relations Transition Act – The Board was asked to consider whether the PSLRTA could apply to a health services integration within a single employer, or only applied when two or more employers were involved – The Board accepted OPSEU's argument that with the introduction of health service integrations into the Act, the focus of the PSLRTA shifted from macro events like amalgamations to smaller restructuring activities, including the movement of departments from one hospital to another, or even within one institution – The Board determined that if the PSLRTA did not apply to a single employer integration, the labour relations of that employer could be negatively affected by the integration, with no recourse for aggrieved employees – Matter referred to Registrar for scheduling a hearing on the merits

ST. JOSEPH'S CARE GROUP; RE: Ontario Public Service Employees Union; RE: Ontario Nurses' Association; RE: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) and its Local 229; OLRB File No. 3151-12-PS; Dated December 16, 2014; Panel: Brian McLean (11 pages)

***Ambulance Services Collective Bargaining Act* – Essential Services Agreement** – The parties could not agree on the extent to which the amount of time it takes for an ambulance to reach a patient is an essential service – The ASCBA does not refer to response times in its definition of essential service – The Board confirmed that response times are a component of an essential ambulance service – The circumstances of entering into an ESA mean that it is not "business as usual" and that "free collective bargaining assumes that there *will* be negative repercussions in strike or lock-out

situations" – The Board agreed with the union that it would be inappropriate to place the burden of whether to accept a call on the ambulance workers – With respect to cleaning the ambulances, the Board was satisfied that deep sanitizing the interior of the vehicle in accordance with normal practice is an essential ambulance service – Cleaning the outside is only essential at the point where the ambulance's exterior color and markings are no longer readily visible and that the vehicle cannot be recognized as an ambulance – The Board refused to take into account the fact that the employer may use other persons to perform tasks done by striking or lock-out paramedics – Terms of Essential Services Agreement issued

THE CORPORATION OF THE COUNTY OF FRONTENAC; RE: Ontario Public Service Employees Union; OLRB File Nos. 3172-13-M; Dated December 8, 2014; Panel: Brian McLean (9 pages)

The decisions listed in this bulletin will be included in the publication Ontario Labour Relations Board Reports. Copies of advance drafts of the OLRB Reports are available for reference at the Ontario Workplace Tribunals Library, 7th Floor, 505 University Avenue, Toronto.

Pending Court Proceedings

Case name & Court File No.	Board File No.	Status
Royal Ottawa Hospital Divisional Court No.14-62782 **(Ottawa)**	2461-14-IO	January 30, 2015
BACU (BMC Masonry) Divisional Court No.459/14	3236-13-R 0451-14-U	Pending
College Employer Council Divisional Court No.397/14	1143-14-CV	Pending
Dean Warren Divisional Court No.345/14	2336-13-U	Pending
LIUNA- Trisan Divisional Court No.342/14	2620-13-G 2001-13-G et al	Abandoned December 19,2014
Donald A. Willams Divisional Court No.327/14	1129-13-U	Pending
PCL Constructors Canada Inc. Divisional Court No. 240/14	3414-11-G	Pending
Bogdan Koscik Divisional Court No. DC-14-000636-00JR **(Newmarket)**	0956-13-U	Pending
John Harrison Divisional Court No. 189/14	1375-13-U	February 20, 2015
Mary McCabe Divisional Court File No.14-2012 **(Ottawa)**	2737-12-U	Pending
LIUNA - Rudyard; Zzen Divisional Court No. 485/13	0318-13-R	April 27, 2015
2218783 Ontario Inc. Divisional Court No. 13-DV-0133 **(Brampton)**	2872-12-ES	Pending
Merc Electrical Limited Divisional Court No. 437/13	0452-13-G	Pending
Godfred Kwaku Hiamey Divisional Court No. 345/13; 346/13	2906-10-U 3568-10-U	Pending
EllisDon Corporation Court of Appeal No. C58371 (EllisDon seeking leave to SCC)	0784-05-G	Allowed Board Decision restored November 17/14
EllisDon Corporation Divisional Court No. 309/12	2076-10-R	Pending

Hassan Hasna Divisional Court No. 83/12	3311-11-ES	Pending
John McCredie v. OLRB et al Divisional Court No. 1890/11 **(London)**	1155–10–U	Pending
Dr. Peter A. Khaiter v. OLRB et al Divisional Court No. 213/11	0816–10–U 0817–10–U	Dismissed; Seeking Motion to set aside
Dr. Peter A. Khaiter v. OLRB et al Divisional Court No. 383/10	0290–08–U 0338–08–U	See above
Dr. Peter A. Khaiter v. OLRB et al Divisional Court No. 431/08	4045–06–U et al	See above